IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 597.

JAMES E. MILLS,
Defendant, Appellant,

vs.

STATE OF ALABAMA,
Plaintiff, Appellee.

On Appeal from the Supreme Court of Alabama.

BRIEF OF APPELLANT.

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BRIEF OF APPELLANT.

OPINIONS BELOW.

The opinion below, from which this appeal is taken, is **State of Alabama v. James E. Mills**, — Ala. —, 176 So. 2d 884, and appears in the Transcript of Record at pages 24-33. Appellant's application for rehearing was overruled by an unreported order of the Alabama Supreme Court and appears in the Record at page 38. The judgment of the trial court (Jefferson County Criminal Court) was not reported, and appears in the Record at pages 19-20.

JURISDICTION.

The proceeding below was instituted on November 13, 1962, by the State of Alabama, in a criminal complaint, subsequently amended, charging appellant with a violation of Section 285, of the Alabama Corrupt Practices Act. The Corrupt Practices Act is embodied in Sections 268-286 of Title 17, Code of Alabama, 1940, but only Section 285 is in issue in these proceedings (Appendix A).

Appellant demurred to the complaint on several constitutional grounds. The Jefferson County Criminal Court, on December 26, 1962, sustained the demurrers to the amended complaint solely on the basis of the demurrers challenging the constitutionality of Title 17, Section 285, Code of Alabama, 1940, as being in violation of the Constitution of Alabama and the First and Fourteenth Amendments to the Constitution of the United States. The State of Alabama appealed from this order under Title 15, Section 370, Code of Alabama, 1940 (Appendix B). The Supreme Court of Alabama, by a judgment entered March 4, 1965, application for rehearing overruled July 15, 1965, reversed the decision of the Jefferson County Criminal Court, holding that Title 17, Section 285, Code of Alabama, 1940, was constitutional (R. 24-33). Notice of appeal was filed in the Supreme Court of Alabama on July 26, 1965 (R. 38-41).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257, the applicable provisions of which are as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws

of the United States, and the decision is in favor of its validity."

The opinion of the Supreme Court of Alabama in the case of **State of Alabama v. James E. Mills**, — Ala. —, 176 So. 2d 884, reversing the judgment of the Jefferson County Criminal Court, upheld the constitutionality of Title 17, Section 285, Code of Alabama, 1940, and constituted a final judgment within the purview of 28 U. S. C. § 1257.

The final order of the Supreme Court of Alabama was dated July 15, 1965, and notice of appeal to the Supreme Court of the United States, as prescribed by Rule 10 of the Supreme Court Rules, was filed on July 26, 1965, with the Clerk of the Court of the Supreme Court of Alabama, such filing being within the ninety-day period prescribed by Rule 11 of the Supreme Court Rules.

This Court on December 6, 1965, entered the following order in this case:

"Further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Title 17, Section 285, Code of Alabama, 1940 (Appendix A).

Title 15, Section 370, Code of Alabama, 1940 ((Appendix B).

Title 17, Section 332, Code of Alabama, 1940 (Appendix C).

United States Constitution, Amendment I (Appendix D).

United States Constitution, Amendment XIV, Section 1 (Appendix E).

28 U. S. C., § 1257 (Appendix F).

Title 13, Section 349, Code of Alabama, 1940 (Appendix G).

Title 15, Section 363, Code of Alabama, 1940 (Appendix H).

Title 15, Section 366, Code of Alabama, 1940 (Appendix I).

Title 13, Section 87, Code of Alabama, 1940 (Appendix J).

QUESTIONS PRESENTED.

1. Whether a judgment of the highest court of a state which reverses the judgment of a court below sustaining demurrers to a criminal prosecution on the ground that the statute under which the prosecution is brought is unconstitutional is "final" for the purposes of 28 U. S. C., § 1257 where the defendant concedes that he has no defense except for the unconstitutionality of the statute.

2. Whether Title 17, Section 285, Code of Alabama, 1940, which prohibits as a corrupt practice "electioneering" or the solicitation of any votes on election day, and which has been construed by the Supreme Court of Alabama to apply to a newspaper editor who writes and causes to be published in a newspaper of general circulation on election day editorial comment on the issues of said election, is in violation of the First Amendment and the Fourteenth Amendment to the Constitution of the United States prohibiting the abridgment of freedom of speech or of the press.

3. Whether Title 17, Section 285, Code of Alabama, 1940, violates the Fourteenth Amendment to the Constitution of the United States because the language contained therein which sets forth acts prohibited on election day is so vague and indefinite as to deprive of due process of law a newspaper editor who writes and causes to be published in a newspaper of general circulation on election day editorial comment on the issues of said election.

STATEMENT OF THE CASE.

Appellant, James E. Mills, is the editor of the Birmingham Post-Herald, a daily newspaper published in Birmingham, Alabama, and delivered to paid subscribers throughout that state. On November 6, 1962, a municipal election was held in the City of Birmingham to determine whether the existing commission form of city government should be retained or whether it should be replaced by the mayor-council form of government. It is conceded by appellant that on the eve of election day he wrote an editorial (Appendix K) for the paper's election day edition in which he stated that the Mayor of Birmingham had proposed to raise city employees' salaries and had announced that he (the Mayor) would instruct public employees not to discuss news regarding the public business with newspaper reporters. That the Mayor did suggest pay raises and make such statements is unchallenged. In addition, appellant editorially criticized the Mayor for the above statements, declaring that

> "It was another good reason why the voters should vote overwhelmingly today in favor of Mayor-Council government.
>
> * * * * * * * *
>
> "Birmingham and the people of Birmingham deserve a better break. A vote for Mayor-Council government will give it to them" (Appendix K).

The State of Alabama has enacted a Corrupt Practices Act, Title 17, Sections 268-286, Code of Alabama, 1940. Section 285 (Appendix A) declares it to be a

> "corrupt practice for any person on any election day . . . to do any electioneering or to solicit any votes . . . in support of or in opposition to any proposition that is being voted on on the day on which the

election affecting such . . . propositions is being held."

The commission of a "corrupt practice" is a criminal offense. Title 17, Section 332, Code of Alabama, 1940 (Appendix C).

On the basis of the editorial described above a criminal complaint was issued on November 13, 1962, from the Jefferson County Criminal Court charging appellant with a violation of Section 285. Said complaint having been subsequently amended, appellant filed demurrers to the amended complaint raising, among other issues, the applicability of Section 285 to newspaper editorials and the constitutionality of Section 285. Appellant maintained that if the Alabama Corrupt Practices Act was construed to apply to the conduct of appellant in writing and causing to be published the editorial comment on the day of election, it was repugnant to the First and Fourteenth Amendments to the Constitution of the United States as an unwarranted and unconstitutional abridgment of freedom of speech and of the press. Appellant further maintained that Section 285 was void for uncertainty and vagueness and, therefore, unconstitutional, being violative of the Fourteenth Amendment to the Constitution of the United States.

The Jefferson County Criminal Court, on December 26, 1962, sustained said demurrers, basing its decision "solely on the grounds of demurrer challenging the constitutionality of Title 17, Section 285, Code of Alabama, 1940, as being in violation of [certain provisions of the Alabama Constitution not here in issue, and] the First Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States" (R. 19-20).

The State of Alabama, pursuant to Title 15, Section 370, Code of Alabama, 1940 (Appendix B), appealed directly to the Supreme Court of Alabama.

The Supreme Court of Alabama, on March 4, 1965, reversed the decision of the Jefferson County Criminal Court of Alabama (R. 24-33), and held that Section 285 applied to the editorial written and published by appellant and, as applied, the statute was constitutional. An application for rehearing was denied on July 15, 1965 (R. 38).

SUMMARY OF ARGUMENT.

1. All defenses below have been foreclosed by the decision of the Supreme Court of Alabama. Since there is nothing more of substance to be determined in the Alabama courts, that decision is a final judgment for the purposes of 28 U. S. C., § 1257. Appellant should not be required to risk a criminal conviction in order to secure the protection of the rights guaranteed him by the First and Fourteenth Amendments to the Constitution of the United States, nor should review of the vital federal question here involved be further delayed by the formality of a trial and another appeal through the Alabama judicial hierarchy, necessarily limited to those issues which have already been decided adversely to appellant.

2. The application of Section 285 of the Alabama Corrupt Practices Act to proscribe the publication of a newspaper editorial commenting on public issues on election day is an unconstitutional infringement of appellant's right of free speech, guaranteed him by the First and Fourteenth Amendments to the Constitution of the United States.

3. Section 285 of the Alabama Corrupt Practices Act is so vague and indefinite that it fails to inform what conduct will render persons liable to its criminal penalties and establishes no ascertainable standard of guilt. Such vagueness is repugnant to due process, and the statute is, therefore, in violation of the Fourteen Amendment to the Constitution of the United States.

ARGUMENT.

I.

The Opinion and Order of the Supreme Court of Alabama Reversing the Action of the Jefferson County Criminal Court Sustaining Appellant's Demurrers to the Criminal Complaint Filed Against Him Constituted a Final Judgment by the Highest Court of Alabama, Upholding the Validity Under the Federal Constitution of Section 285, Title 17, Code of Alabama, 1940.

The jurisdictional issue in this case arises because on its face the opinion and order of the Supreme Court of Alabama did not necessarily end the litigation between the State of Alabama and the appellant, Mr. Mills. Alabama procedure would permit appellant on the trial of the case below to interpose some defenses other than those of unconstitutionality of Section 285 and of its applicability to the acts of appellant which are the subject of the criminal prosecution lodged against him by the State. But in reality appellant has no other defense in fact or law to the charge. He readily concedes that he wrote the editorial complained of and caused it to be published on election day, and the Alabama Supreme Court has specifically held that this constituted a violation of Section 285 of the Alabama Corrupt Practices Act (R. 31-32). Appellant's only remaining defense is unconstitutionality of the statute. The Supreme Court of Alabama has held the statute to be constitutional as applied to appellant (R. 33). Thus, the federal question is the only question remaining—there is nothing more to be decided.

On the authority of **Pope v. Atlantic Coast Line R. Co.**, 1953, 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094, this Court has jurisdiction. There the Georgia Supreme Court reversed the order of a trial court sustaining the general

demurrer to an action to enjoin an employee from prosecuting a suit against his employer in the Alabama courts under the Federal Employers Liability Act. The demurrer had raised the provisions of the federal statute as a bar to the power of the Georgia courts to issue the injunction. This Court, although acknowledging that ordinarily the overruling of a demurrer is not a "final" judgment, nevertheless, held that the Georgia Supreme Court's denial of this federal claim was reviewable. The Court looked at the whole record and concluded that for all practical purposes, the litigation in the Georgia Courts was terminated since the employee freely conceded that he had no further defenses to offer in the state courts.

In assuming jurisdiction, the Court relied upon **Richfield Oil Corporation v. State Board of Equalization,** 1946, 329 U. S. 69, 67 S. Ct. 156, 91 L. Ed 80, stating, page 382, 751:

> "The finality problem arises in this case because the judgment of the Georgia Supreme Court did not, on its face, end the litigation. Both parties agree that Georgia procedure would permit petitioner to return to the Superior Court of Ben Hill County and interpose some other defense to respondent's suit for an injunction. But petitioner has no other defense to interpose. He has been both explicit and free with his concession that his case rests upon his federal claim and nothing more. If the court below decided that claim correctly, then nothing remains to be done but the mechanical entry of judgment by the trial court. Thus, as the case comes to us, the federal question is the controlling question; 'there is nothing more to be decided.'"

This Court followed **Pope**, supra, in the case of **Local No. 438, Construction & General Laborers' Union, AFL-CIO, Petitioner, v. S. J. Curry,** 1963, 371 U. S. 542, 83

S. Ct. 531, 9 L. Ed. 2d 514, as an alternate reason for sustaining its authority to review in that case the Georgia Supreme Court's assertion of jurisdiction to deal with a controversy falling within the exclusive domain of the National Labor Relations Board. As in the **Pope** and **Curry** cases, supra, so in the case at bar the highest court in the state has actually decided the case on its merits, and there is nothing further of substance to be decided in the trial court. A final judgment has been rendered, and this Court has jurisdiction.

Appellant should not be forced to risk a criminal conviction in order to obtain the benefits of the right of free expression guaranteed him by the Constitution. cf. **Rosenblatt v. American Cynamid Company,** ... U. S. ..., 86 S. Ct. 1, ... L. Ed. .... This will be the effect, however, in the event that the Court denies review at this time. Moreover, it must be anticipated that another two years or more would pass before this case would proceed through the Alabama courts to another petition for review by this Court. In the meantime, the blanket of silence which has descended upon the press of Alabama each election day since the arrest of Mr. Mills would continue to insulate the electorate of Alabama on each election day from press information and comment to which the voters are entitled, without restriction.

The broad sweep of the Alabama Corrupt Practices Act necessarily has a "chilling effect" on the press and on the people of Alabama in the exercise of their rights to free expression. Cf. **Dombrowski v. Pfister**, 1965, 380 U. S. 479, 85 S. Ct. 1116, ... L. Ed. .... This Court has recognized that the threat of sanctions may deter the exercise of First Amendment freedoms almost as potently as the actual application of sanctions. Cf. **Dombrowski v. Pfister**, supra, and **National Association for the Advancement of Colored People v. Button**, 1963, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405.

As stated by this Court in **Dombrowski v. Pfister**, supra, page 486, 1120:

> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, e. g., **Smith v. People of State of California**, 361 U. S. 147. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See **Baggett v. Bullitt**, supra, at 379. For '(t)he threat of sanctions may deter . . . almost as potently as the actual application of sanctions . . .' **NAACP v. Button**, 371 U. S. 415, 433. Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser."

Delay in the adjudication of appellant's constitutional rights must be considered an important factor in this case. The criminal complaint against appellant was filed on November 13, 1962. Thus, it has taken approximately three years for this proceeding to reach only the threshold of this Court, in spite of the expediting provisions of the Alabama statutes for appeals directly to the Alabama Supreme Court from decisions in criminal cases holding the statute involved unconstitutional. If this Court declines to accept jurisdiction of this appeal for want of a final judgment, the case will be remanded to the trial court and thereafter will have to wend its way back up

through the appellate procedure of Alabama, beginning with trial in the Jefferson County Criminal Court where, under the mandate of the Supreme Court of Alabama, the appellant will be found guilty. Appeal to the Circuit Court will require bond to be made (Title 13, § 349), a second trial de novo (Title 15, § 363), an appeal to the Alabama Court of Appeals (Title 15, § 366), and, finally, an appeal to the Supreme Court of Alabama (Title 13, § 87).* The Supreme Court of Alabama will then pass upon the same constitutional question which it originally decided on the State's appeal (R. 24-33). The only controverted issues in this case are appellant's federal constitutional claims, since all others have been resolved by the decision of the Supreme Court of Alabama or have been conceded by appellant. Such a prolongation of a decision to vindicate appellant's constitutional rights would be intolerable.

A denial of review by the Court at this time would only serve needlessly to perpetuate the existing uncertainty and the resulting chilling effect to the exercise of free expression in Alabama.

II.

Section 285 of the Alabama Corrupt Practices Act Is Unconstitutional as Applied by the Supreme Court of Alabama to Appellant's Election Day Editorial.

Section 285 of the Alabama Corrupt Practices Act declares it a corrupt and proscribed practice for any person on any election day to do "any electioneering or to solicit any votes * * * in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held".

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* These statutory references are to Code of Alabama, 1940, and are set forth, respectively, in Appendices G, H, I and J.

The Supreme Court of Alabama held that "there can be no sort of doubt that the editorial distributed on the election date violates the Corrupt Practices Act of soliciting votes or electioneering on election day" (R. 31-32).

The freedom of speech and press secured by the First Amendment to the United States Constitution is protected against infringement by Congress, and the Fourteenth Amendment similarly secures these rights against abridgement by a state. **Schneider v. State of New Jersey**, 1939, 308 U. S. 147, 60 S. Ct. 146, 80 L. Ed. 155.

Cases involving conflict between legislation and the free speech guarantees of the First Amendment have been presented to this Court over the years in a great variety of contexts and circumstances. Inevitably, therefore, the Court has expressed the rationale of First Amendment decisions in different ways. The classic test, however, remains the "clear and present danger" test, enunciated by Mr. Justice Holmes in **Schenck v. United States**, 1919, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470, in which case Mr. Holmes stated, page 52, 249:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

The "clear and present danger" test was likewise applied to state legislation in the case of **Whitney v. California**, 1927, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095.

Appellant concedes that the Corrupt Practices Act has a legitimate field of operation. Legislation aimed at preventing corrupt elections is desirable and in the public interest. According to **Webster's New International Dictionary** (1930), page 507, the word "corrupt" is synonymous with "adulterated, tainted, spoiled, defiled, polluted,

contaminated, vicious, debased, unsound". Election practices falling within this category are substantive evils against which the state has a right to protect the public. It cannot be seriously contended, however, that an honest and orderly election in Birmingham, Alabama, was imperiled by the publication of the James E. Mills editorial on election day. Electioneering in the form of newspaper editorials does not jeopardize the honesty or the orderliness of the election process. This is not a "substantive evil", presenting a clear, present, close-at-hand danger requiring restriction of the constitutional rights of free expression. To the contrary, the public interest is best served in a free society by protecting the unrestricted right of every newspaper editor to speak out clearly and to comment and editorialize on matters political every day of the year, including election day.

In the course of its opinion in the **Mills** case, the Alabama Supreme Court makes the following remarkable statement (R. 31):

> "This Court holds in accordance with the great weight of authority that a law cannot be held to be invalid because unreasonable unless and until it appears beyond reasonable controversy that it unnecessarily impairs **to the point of practical destruction** a right safeguarded by the Constitution. As has already been pointed out, the law under consideration lies within the police power field and impairs **only** the right of free speech which includes a right to write and publish one's views." (Emphasis supplied.)

Contrary to the holding of the Supreme Court of Alabama, this Court has long recognized the "preferred" status afforded First Amendment rights. Thus, in the case of **West Virginia State Board of Education v. Barnette**, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, the Court stated, page 639, 1186:

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. * * *"

And in **Thomas v. Collins**, 1945, 323 U. S. 516, 65 S. Ct. 315, 89 L. Ed. 430, this Court, in striking down a state statute requiring registration of labor organizers, again recognized the preferred status of First Amendment rights, in the following statement of Mr. Justice Rutledge, pages 529-530, 322-323:

"The case confronts us again with the duty our system places on this court to say where the individual's freedom ends and the state's power begins. Choice on that border now as always delicate is perhaps more so where the usual presumptions supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable, democratic freedoms secured by the First Amendment * * *. That priority gives these liberties a

sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. * * *

"For these reasons, any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed which in other contexts might support legislation against attack on due process grounds will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

The recognition of the preferential status afforded First Amendment rights is not to deny the principle that legislative judgment must be accorded proper consideration. But as this Court has repeatedly declared, "that judgment does not bear the same weight and is not entitled to the same presumption of validity, when the legislation on its face or in specific application restricts the rights of conscience, expression and assembly protected by the Amendment, as are given to other regulations having no such tendency." **United States v. Congress of Industrial Organizations**, 1948, 335 U. S. 106, 140, 68 S. Ct. 1349, 1366, 92 L. Ed. 1849, concurring opinion of Mr. Justice Rutledge.

As stated by Mr. Justice Roberts, in **Schneider v. State of New Jersey**, supra, pages 161, 150-151:

"This Court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and

was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this Court, the importance of preventing the restriction of enjoyment of these liberties.

"In every case, therefore, where the legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

The only justification alleged by the Supreme Court of Alabama for upholding the constitutionality of the statute in question is that "it is a salutary legislative enactment that protects the public from confusive last-minute charges and counter-charges and the distribution of propaganda in an effort to influence voters on election day; when as a practical matter because of lack of time such matters cannot be answered or their truth determined until after the election is over" (R. 33).

This assertion of legislative purpose and justification is wholly specious. The public is neither more nor less protected from "last-minute charges and counter-charges" if the prohibition against electioneering and solicitation of votes is placed at one day, thirty days, sixty days, or more, prior to the election, than if there were no prohibition whatsoever. The fact of the matter is that someone always has the last word, and that would be equally so whether or not a deadline is set. The State of Alabama, in imposing the election day curfew, accomplishes no legitimate legislative purpose. To black out news and editorial comment on election day is a serious interference

with freedom of speech and freedom of the press and represents an unjustified intrusion upon the clear command and purpose of the First Amendment.

Even if we assume that voters who are exposed to editorial comment on an election might be persuaded thereby to take action against their best interests, this is of no legitimate legislative interest to the State of Alabama. The "danger" that the public will be persuaded to adopt an incorrect opinion is not one which government has any right to prevent. As stated in the case of **Thornhill v. State of Alabama,** 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, pages 104-5, 745:

> "* * * Every expression of opinion on matters that are important has a potentiality of inducing action in the interest of one rather than another group in society, but the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evil arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. * * *"

The fact of the matter is that no allowable area of State control over elections even remotely justifies the application of Section 285 to prohibit the publication of a newspaper editorial on election day. And, this would hold true even if the editorial "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging." **Terminiello v. City of Chicago,** 1949, 337 U. S. 1, 4, 69 S. Ct. 894, 896, 93 L. Ed. 1131; cf. **New York Times v. Sullivan,** 1964, 376 U. S. 254, 84 S. Ct. 710, 11

L. Ed. 2d 686; **Garrison v. State of Louisiana**, 1964, 379 U. S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125.

The construction by the Supreme Court of Alabama of Section 285 applying it to appellant's editorial is a ruling on a question of state law and is as binding on this Court as though the precise words of the Supreme Court of Alabama had been written into the statute. **Terminiello v. City of Chicago**, supra, page 4, 895.

As construed and applied, the statute violates appellant's rights of free expression. **Terminiello v. City of Chicago**, supra; **Herndon v. Lowry**, 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 1066.

A statute which in the claimed interest of free and honest elections curtails the very freedoms that make possible exercise of the franchise by an informed and thinking electorate, and does this by indiscriminate blanketing of expression cannot be squared with the First Amendment. Cf. concurring opinion of Justice Rutledge in United States v. Congress of Industrial Organizations, supra, pages 155, 1374.

III.

Section 285 of the Alabama Corrupt Practices Act Is Unconstitutional Because It Is Vague and Indefinite.

Section 285 makes it a corrupt practice for any person "to do any electioneering or to solicit any votes * * * for or against the election or nomination of any candidate or in opposition to any proposition that is being voted on on the day on which the election affecting such candidate or proposition is being held".

The statute defines neither "electioneering" nor "solicit". For example, what about billboard advertising

concerning a candidate or an election issue? Does the statute require that these be removed before election day? Is a husband guilty of a "corrupt practice" when on the morning of election day he reminds his wife to go to the polls and vote in favor of a certain candidate or proposition? Are discussions of candidates or election issues on election day prohibited even after the polls are closed or before they are open? Must a newsstand vendor or book seller remove from his shelves all magazines or books in which there appear discussions favoring particular candidates or issues to be voted on that day?

The statute having already been applied to prohibit an editorial on election day may very well be applied by the authorities to other innocuous acts. Here, then, is a penal statute "which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute which readily lends itself to harsh and discriminatory enforcement by local prosecuting officers, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint upon all freedom of discussion that might reasonably be regarded as within its purview." **Thornhill v. State of Alabama**, supra, page 97, 742.

By its vagueness, Section 285 makes criminal activities of a harmless and innocent nature and it cannot, therefore, be sustained. **Herndon v. Lowry**, supra. **Winters v. People of the State of New York**, 1948, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840, page 520, 672.

Section 285 fails to meet the mandate of this Court that statutes restrictive of First Amendment freedoms must be narrowly drawn to meet the precise evil the legislature seeks to curb. **Thornhill v. State of Alabama**, supra.

The First Amendment adds force to the due process requirement of the Fourteenth Amendment that crimes be defined so that they are not so vague and indefinite that large areas of innocent conduct are proscribed together with those acts which the legislature clearly has the right to forbid. **United States v. Congress of Industrial Organizations**, supra, page 153, 1372, concurring opinion of Mr. Justice Rutledge.

Section 285 cannot be sustained under the Fourteenth Amendment, apart from the added force of the First. It is settled law that a criminal statute may be so vague and indefinite in its terminology as to violate "due process" and, therefore, be unconstitutional. To the extent that a statute places a penalty upon one's behavior, concepts of fairness require that it be sufficiently definite as to give notice of what conduct is necessary to avoid the penalties. **U. S. v. Cardiff**, 1952, 344 U. S. 174, 73 S. Ct. 189, 97 L. Ed. 200.

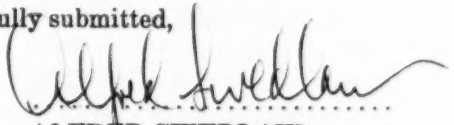
A statute which must act as a guide to future conduct is said to be indefinite "if men of common intelligence must necessarily guess as to its meaning and differ as to its application." **Connally v. General Construction Co.**, 1926, 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322; **Winters v. People of the State of New York**, supra.

Section 285 marks no line between lawfulness and criminality, nor is there any limit as to the geographic areas in which the offenses referred to in the statute must be performed in order to come within its prohibition. It is on its face repugnant to the due process clause and is, therefore, unconstitutional. **Lanzetta v. State of New Jersey**, 1939, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888.

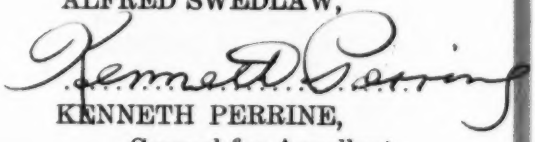
CONCLUSION.

Appellant prays that this Court declare Section 285 of the Alabama Corrupt Practices Act, as construed and applied, void as an unconstitutional infringement of the right of free expression and repugnant on its face to the due process clause of the Fourteenth Amendment, and reverse the judgment of the Supreme Court of Alabama.

Respectfully submitted,



ALFRED SWEDLAW,



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Proof of Service.

I, Kenneth Perrine, counsel of record for James E. Mills, appellant herein, hereby certify that, in compliance with paragraph 1 of Rule 33 of the Supreme Court Rules, I have deposited copies of the foregoing Brief of Appellant in the United States Mail, with first class postage prepaid, addressed respectively to Earl C. Morgan, District Attorney of the Tenth Judicial Circuit of Alabama, counsel of record for the Appellee, at his post office address, Jefferson County Courthouse, Birmingham, Alabama, and to Richmond M. Flowers, Attorney General of

the State of Alabama, counsel of record for the Appellee, at his post office address, Office of the Attorney General, State of Alabama, Montgomery, Alabama.

This the 1 day of February, 1966.

Kenneth D. Gibson

Sworn to and subscribed before me, this the 1 day of February, 1966.

Lucile Rayfield
Notary Public.

APPENDIX A.

Title 17, Section 285, Code of Alabama, 1940:

"§ 285 (599) Corrupt Practices at Elections Enumerated and Defined.—It is a corrupt practice for any person on any election day to intimidate or attempt to intimidate an elector or any of the election officers; or, obstruct or hinder or attempt to obstruct or hinder, or prevent or attempt to prevent the forming of the lines of the voters awaiting their opportunity or time to enter the election booths; or to hire or to let for hire any automobile or other conveyance for the purpose of conveying electors to and from the polls; or, to do any electioneering or to solicit any votes or to promise to cast any votes for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held" (Acts of Alabama 1915, p. 250).

APPENDIX B.

Title 15, Section 370, Code of Alabama, 1940:

"§ 370 (3239) (6246) (4315) (4515) Appeal by State When Statute Declared Unconstitutional.—In all criminal cases when the act of the legislature under which the indictment or information is preferred is held to be unconstitutional, the solicitor may take an appeal in behalf of the state to the supreme court, which appeal shall be certified as other appeals in criminal cases; and the clerk must transmit without delay a transcript of the record and certificate of appeal to the supreme court."

APPENDIX C.

Title 17, Section 332, Code of Alabama, 1940:

"§ 332 (3937) Corrupt Practice in Election or Primary Election.—Any person or persons who do any act defined or declared to be a corrupt practice under the election or primary election laws of this state, or who wilfully fails or refuses to do any act required of such person under this chapter, relating to the corrupt practice law of this state, shall be guilty of a misdemeanor, and, on conviction, must be fined not more than five hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months at the discretion of the court trying the case (1915, p. 250)."